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the Court are, "Cook on Corporations," Rudolph Sohm's "Institutes of Roman Law," Marshall, C. J., and Judge Denio. Two of these are text-books and the other two, though men of the most eminent authority, nevertheless gave their decisions at a time when that proposition was more firmly established than it is to-day. The corporation's separate existence as an entity is admittedly a legal fiction, and is being less and less resorted to by courts to obtain desired results. In reality, the title to the land may, at the dissolution of this corporation, be divided up among its real owners; *i. e.,* the shareholders, and if so, then what becomes of this covenant? Are the real owners to be denied title to their property which they own when composing a corporation, and is a forfeiture either to the State or to the original grantors, to be made when the corporation attempts to divide up its assets among their real owners? If it is admitted that a conveyance to a corporation composed exclusively of colored persons is not a conveyance to colored persons, what rule of law can be invoked to prevent the shareholders from coming into their own on the dissolution of this legal entity? Either this covenant, which is here granted to be sound and binding, is rendered of no effect at all by the fact that a corporation steps in between, or a much more questionable application of the covenant is made at a time when it is far more unjust to enforce it; for entirely innocent shareholders who bought their stock later might suffer, or a white shareholder, supposing such a one to exist, could take title to his pro rata share of the land, while his colored brother, who paid just as much for his stock, could not. It would seem as possible and perhaps more desirable to enforce the covenant, if at all, at a time when it would work less injustice and this would be when the corporation containing colored shareholders first attempted to take title.

Waiver of Constitutional Guaranties.

The right to a jury trial guaranteed by Section 2 of Article 3 of the Federal Constitution, as well as by the 5th, 6th and 7th Amendments[1] thereto, has always been assumed by the

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[1] As the first ten amendments are purely restraints upon the federal government (*Spies* v. *Illinois,* 123 U. S. 86; *Holden* v. *Hardy,* 169 U. S. 366, 382; *Brown* v. *New Jersey,* 175 U. S. 174) and Article 3 relates purely to suits in federal courts (*Eilenbecker* v. *Plymouth Co.,* 134 U. S. 31, 1890) it has been held (*Maxwell* v. *Doe,* 176 U. S. 581) there is no objection to trying felonies against state laws in a state court by a

courts to be the common law jury of twelve;[2] at least such, it was said, must be the number of jurors at the beginning of the case. In *Thompson* v. *Utah*[3] the Supreme Court of the United States decided that one indicted for a felony could not consent to be tried by less than twelve jurors, and any such waiver of his right was invalid. In the case of civil suits this right to a jury of twelve may be waived.[4] The case of petty misdemeanors was raised in *Shick* v. *U. S.*[5] There the defendant was fined $50 by the lower court for selling oleomargarine not stamped as required by the Act of Congress,[6] after waiver by the defendant of his right to be tried by jury. The Court[7] held that such a "petty offense" was not a "crime" within the meaning of Sec. 2 of Article III of the Constitution, and affirmed the conviction. The Court distinctly differentiated such an offense from a misdemeanor of a more serious character, such as would be punished by imprisonment, resting their opinion largely on Blackstone's statement that the word "crimes" technically includes both felonies and misdemeanors, yet "in common usage the word "crimes is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of "misdemeanors only,"[8] the Constitutional Convention having by unanimous vote amended the words "the trial of all criminal offenses" in Sec 2 of Article 3 to read "the trial of all crimes."

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jury of less than twelve, if such is provided for by the state constitution (the statute in Utah provided for a trial of felonies by a jury of 8).

[2] *Thompson* v. *Utah*, 170 U. S. 343 (1898).

[3] *Supra.*

[4] *Parsons* v. *Armor*, 3 Pet. 413; *U. S.* v. *Rathbone*, 2 Paine, (U. S.) 578. (A similar view has been taken by the state courts concerning similar provisions in the state constitutions: *Huron* v. *Carter*, 5 S. Dak. 4; *Cravins* v. *Grant*, 4 T. B. Monroe, 126; *Roach* v. *Blakey*, 89 Va. 767; *Krenchi* v. *Dehler*, 50 Ill. 176.) The phraseology of the 7th Amendment is, "The right of trial by jury," &c., hence it is not mandatory so as to be incapable of waiver by the defendant. Similarly the word "right" is used in reference to the privileges guaranteed by the 6th Amendment in criminal cases. On the contrary, Sec. 2 of Article 3 and the 5th Amendment are unqualifiedly mandatory.

[5] 195 U. S. 65 (1904).

[6] Oleomargarine Act of 1886 (24 St. 209) as amended by Act of 1902 (32 St. 93).

[7] Harlan, J. dissenting.

[8] Commentaries, vol. 4, page 5.

In the recent case of *Dickinson* v. *U. S.*[9] the Circuit Court of Appeals for the First Circuit held that a cashier of a national bank indicted for "the unlawful conversion of certain moneys, funds and credits," a misdemeanor under Sec. 5209 Revised Statutes, could not consent to be tried by less than twelve jurors. The case started with a jury of the requisite number—twelve; two of the jurors were, however, excused by the Court for cause (illness and death in the family) during the trial. The defendant in writing agreed to the discharge of the jurors and the continuance of the case, and then on appeal alleged that the trial was on this account unconstitutional since there was no trial by a common law jury. The majority of the court[10] agreed with the contention of the defendant and set aside the judgment. The Court distinguished between the provisions of the Constitution as originally adopted and the first ten amendments, holding that the latter were merely a Bill of Rights, and as such intended purely for the protection of the person to be benefited thereby, and hence, as he alone was concerned in their enforcement, they could be waived, while the former generally was intended to establish a form of government, and as such the entire public had an indirect interest in its enforcement, and hence it could not be waived, since to do this would be to allow any defendant to change the form of government in the constitution of the courts at his will. Just as no defendant in a criminal suit could agree to have his case tried by Congress, so he could not agree to be tried by less than twelve jurors, since either is a change in the constitution of the tribunal which the people of the United States have provided for the trial of such offenses as the one best suited to subserve the public interests.[11] And this is true though, says the Court[12] at least in the case of misdemeanors, he can waive the right to compulsory process for witnesses, the right to the assistance of counsel in his defense, the right to be confronted by witnesses[13] and the like—privileges secured

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[9] 159 Fed. 801 (decided Feb. 12, 1908).

[10] Aldrich, J., dissenting.

[11] The proceeding is "*in invitum* against the will of the defendant" and he is not in a position "to change the constitution of the court and jury by which he is to be tried" (*Hill* v. *People*, 16 Mich. 351). "He has no power to consent to the creation of a new tribunal unknown to the law to try his offense" (*St.* v. *Mansfield*, 41 Mo. 470).

[12] At page 806.

[13] See Cooley on Constitutional Limitations, (7th edition) page 441, note 1, and page 452. See also note 1 (*supra*).

to him purely through the Sixth Amendment, and hence intended merely as a personal protection and not going to the constitution of the Court.[14]

The question of waiver in the case of a serious misdemeanor has never come before the Supreme Court of the United States, and the English cases never seem to have decided the point, though they contain some conflicting dicta.[15] The cases in the States where the right of waiver of a jury of twelve was denied have been mostly cases of felonies,[16] though the *ratio decidendi* is usually broad enough to cover either the case of felonies or misdemeanors. The great majority of the State cases where the question of *Dickinson* v. *U. S.*[9] has actually arisen have decided that the waiver was valid[17].

The Constitutionality of the Commodities Clause of the Hepburn Act.

On September 10, 1908, the Circuit Court of the United States for the Eastern District of Pennsylvania, in *United States* v. *The Coal Roads,* decided, that the Commodities Clause of the Hepburn Act was invalid, because "in the opinion of this Court, the enactment in question is not a regulation of commerce within the proper meaning of those words as used in the Commerce Clause of the Constitution, and therefore not within the power granted by that clause;" and secondly, because it violated the Fifth Amendment. A comparison of this case

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[14] In *Teenan* v. *Oklahoma,* 190 U. S. 343 (murder), the Supreme Court held that the right to object to the disqualification of a juror discovered after the taking of evidence had begun may be waived. But see *Hill* v. *People,* (*supra*), (murder), contra.

[15] Cf. Forsyth's History of Trial by Jury, 241; Lord Dacre's Case, Kelyng's Reports, 56.

[16] *Hill* v. *People,* (*supra*); *Wilson* v. *St.,* 16 Ark. 601; *St.* v. *Mansfield,* (*supra*). See also Cooley's Constitutional Limitations (7th ed.), page 458 and cases cited in note 1 on that page.

[17] *Comm.* v. *Dailey,* 12 Cush. 80 (per Shaw, C. J.); *C.* v. *Sweet,* 16 Pa. C. C. 198; 4 Dist. 136 (false pretences); *St.* v. *Borowski,* 11 Nev. 119 (misdemeanor in office); *St.* v. *Cox,* 8 Ark. 436 (assault and battery); *Murphy* v. *Comm.,* 1 Metc. (Ky.) 365 (betting at an election). The defendant was fined $100 and the court adverts to the petty character of the offense in arriving at their decision.